# FURTHER DEVELOPMENTS ON PREVIOUS SYMPOSIA

# UNITED STATES TORT LIABILITY FOR WAR CRIMES ABROAD: AN ASSESSMENT AND RECOMMENDATION

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## I

## INTRODUCTION

Recently, the issue of tort recovery against individuals and national governments by victims of international humanitarian law violations has entered the international spotlight. Victims of Japanese atrocities during World War II have filed actions in Japanese courts to obtain compensation.[1] Victims of Soviet World War II atrocities have sought redress against Russia in a U.S. district court.[2] A Bosnian victim of Serbian atrocities has attempted to obtain



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1. *Eight Dutch Citizens Sue Japan Over War*, N.Y. TIMES, Jan. 26, 1994, at A9; *Former Dutch 'Comfort Women' to File Compensation Suit*, Japan Economic Newswire, Jan. 21, 1994, *available in* LEXIS, News Library, Jen File; *Hong Kong War Victims Prepare Law Suit Against Japan*, Japan Economic Newswire, July 4, 1993, *available in* LEXIS, News Library, Jen File; Lian Nemenzo, *Comfort Women Seek Compensation*, Inter Press Service, Mar. 5, 1993, *available in* LEXIS, News Library, Inpres File.

In January 1995, more than 20,000 plaintiffs from five nations filed a mass suit in Tokyo. Teresa Ooi, *1,000 Aussie Victims of WWII Join Suit Against Japan*, STRAITS TIMES (Singapore), Jan. 17, 1995, at 5, *available in* LEXIS, News Library, Strait File. The suit alleged Japanese mistreatment of the plaintiffs in World War II prison and internment camps and claimed more than $700 million (U.S.) in damages. *Id.*

In April 1995, 41 Chinese plaintiffs submitted demands to the Japanese government for apologies and compensation for various crimes committed by Japanese forces during World War II. *1st Group of China War Victims to Seek Compensation*, Japan Economic Newswire, April 26, 1995, *available in* LEXIS, News Library, Jcn File. The plaintiffs expect to file their claims in a Japanese court. *Id.*

2. Stephen Schwartz, *Polish Americans Sue Over Stalin-Era Killings*, S.F. CHRON., Mar. 5, 1993, at A16. The suit was dismissed on the ground that the Russian Federation enjoys immunity from all acts committed by its predecessor government prior to 1952, when the U.S. State Department abandoned its policy of supporting absolute sovereign immunity for foreign states in U.S. courts. *Suit Against Russian Government Tossed Out*, UPI, June 17, 1993, *available in* LEXIS, News Library, UPI File.

money damages and injunctive relief in a U.S. district court against a Bosnian Serb leader who allegedly ordered acts of murder, rape, torture, forced prostitution, and forced impregnation.[3] Although none of these actions names the United States or U.S. military personnel as defendants, one commentator has already suggested that Laotian civilians injured by the U.S. bombing campaign in Laos during the Vietnam War might be able to recover in administrative proceedings against the U.S. government.[4]

Is it possible for foreign nationals to recover damages from the U.S. government in U.S. courts or administrative bodies for injuries suffered as a result of law of war violations by U.S. service members? Alternatively, can foreign victims recover against individual U.S. service members? An examination of U.S. tort law and immunities reveals that such plaintiffs would be able to recover against the U.S. government only under rare circumstances. Actions against individual service members would be at least as difficult to sustain, even in the unlikely event that a solvent, individual defendant could be identified.

In the 1951 *Law and Contemporary Problems* symposium entitled "War Claims," Professor Quincy Wright recommended that the international law respecting war claims be reshaped to promote greater respect for law and human rights.[5] Professor Wright believed that all combat-related damages should be compensated through "national or international plans for recovery" rather than through "individual claims against any government," because, in his view, the primary purpose of war claims was to finance reconstruction, not to apportion blame for combat damages.[6] With respect to most combat damages, Professor Wright was entirely correct. However, regarding damages arising from violations of the laws of war, individual claims can have a vital role to play in the enforcement system.

This note proposes that victims of war crimes be permitted to recover against the U.S. government through administrative procedures similar to those of the Foreign Claims Act (the "FCA").[7] Extending the U.S. military claims system to victims of war crimes would serve purposes as vital as those already served by the FCA. Victims of war crimes would have an opportunity to air

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3. Kadic v. Karadzic, Nos. 93 Civ. 0878 (filed Feb. 11, 1993), 93 Civ. 1163 (filed Mar. 2, 1993) (copy of complaint on file with author), *dismissed sub nom* Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994). The court dismissed the case on the ground that the defendant, as leader of the Bosnian Serb militia, was not acting under the color of law of any recognized country, as required under the U.S. alien tort laws. *Doe*, 866 F.Supp. at 740-41. The plaintiffs have appealed the dismissal to the U.S. Court of Appeals for the Second Circuit. Grant McCool, *Attorneys Appeal Ruling in Karadzic Lawsuit*, Reuters World Service, June 20, 1995, *available in* LEXIS, News Library, Reuwld File.

4. Kenneth P. Kingshill, Comment, *Present-Day Effects of United States Bombing of Laos During the Vietnam War: Can Injured Laotians Recover Under the Federal Tort Claims Act?*, 13 LOY. L.A. INT'L & COMP. L.J. 133 (1990). Kingshill concludes that Laotian bombing victims can recover under the Foreign Claims Act, 10 U.S.C. § 2734 (1988), only because the peculiar circumstances of their tort fit into a "loophole" in the act. Kingshill, *supra*, at 174.

5. Quincy Wright, *War Claims: What of the Future?*, 16 LAW & CONTEMP. PROBS. 543, 549 (Summer 1951).

6. *Id.* at 550.

7. 10 U.S.C. § 2734 (1988).

grievances and to be compensated, just as foreign victims of peacetime crimes by U.S. service members are compensated through the existing claims system. The proposed claims system would provide the U.S. military with an additional method of alerting senior operational leaders to evidence of war crimes. Commanders then would have greater opportunity to investigate and prosecute the offenders in the military justice system. By quickly satisfying the claims of war crimes victims in administrative proceedings, the United States might be better able to retain criminal jurisdiction over its own soldiers, rather than have them tried in international tribunals. Most importantly, providing war crimes victims access to a responsive and efficient compensation system would enhance the nation's image as a defender of human rights and the rule of law.

Part II of this note briefly examines the development of international law and procedure regarding war crimes and war claims, and argues that the two bodies of law are becoming more closely related. Part III examines bases for jurisdiction over war crimes claims in the U.S. court system and concludes that such jurisdiction has a legal basis. Part IV analyzes the impact of U.S. sovereign immunity law on war crimes claims and concludes that federal law precludes virtually any possibility of a successful claim against the U.S. government or against individual war criminals. Part V suggests a solution that may allow for compensation of war crimes victims without any great adverse effects. Part VI concludes that a system for compensating foreign victims of U.S. war crimes would serve valuable purposes, including the demonstration of U.S. commitment to the international rule of law.

## II

## BACKGROUND: THE LAW OF WAR AND WAR CLAIMS

While international law theoretically has mandated restitution to war crimes victims for some time, individuals have not frequently sought such restitution until recently. By contrast, crime victims in various domestic law systems have enjoyed and exercised a right to restitution for centuries.[8] This section provides some background on the body of international law governing war crimes and tort claims and sets forth some practical reasons why, in view of recent international trends, the two legal regimes should be considered in tandem.

### A. The Law of War and Its Enforcement

Over the centuries, the nations of the world have developed an extensive body of international law governing the behavior of military personnel in times

8. For an historical overview and comparative analysis of crime victim restitution in the U.S. and Australia, see Maxine D. Kersh, Comment, *The Empowerment of the Crime Victim: A Comparative Study of Victim Compensation Schemes in the United States and Australia*, 24 CAL. W. INT'L L.J. 345 (1994).

of armed conflict.[9] Underlying this body of law is the principle that it is important to limit the cruelty of war by placing certain legal constraints on political and military leaders as well as on common soldiers.[10] As with any other body of law, the effectiveness of the international law of war and of related human rights precepts[11] depends upon the availability and application of enforcement mechanisms.

The primary method of enforcing the law of war has been criminal prosecution of suspected war criminals in national criminal justice systems. Although there have been many successful criminal prosecutions in this century,[12] the success of this method depends on the ability and willingness of the prosecuting state to both capture enemy war criminals and prosecute its own soldiers for war crimes. Moreover, even in the most egregious atrocity cases,

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9. The international humanitarian law of armed conflict, more commonly referred to as "the law of war," is the oldest branch of international law, having existed in some form since ancient times. Rules governing warfare have existed in all of the world's major civilizations. DOCUMENTS ON THE LAWS OF WAR 1-2 (Adam Roberts & Richard Guelff eds., 2d ed. 1989) [hereinafter DOCUMENTS]; G.I.A.D. DRAPER, THE IMPLEMENTATION OF THE MODERN LAW OF ARMED CONFLICTS 7 (1973). During the 15th through 17th centuries, writers such as Hugo Grotius systematically reduced customary international standards of warfare to written form. *Id.* at 2. During the late 19th century, nations began to codify the laws of war as a system of international conventions. *See, e.g.*, Declaration Respecting Maritime Law, April 16, 1856, 15 Martens Nouveau Recueil (ser. 1) 791. In 1899, the First Hague Peace Conference completed the world's first widely ratified, comprehensive codification of rules governing land warfare. Convention Respecting the Laws and Customs of War on Land, With Annex of Regulations (Hague II), July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949; DOCUMENTS, *supra*, at 43. The 1907 revision of the Hague Convention II, Convention Respecting the Laws and Customs of War on Land, With Annex of Regulations (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461, is widely recognized as an authoritative codification of rules governing the conduct of land warfare. DOCUMENTS, *supra*, at 44.

After the Second World War, an international conference in Geneva concluded four conventions designed to protect the victims of war, specifically the wounded and sick on land, the wounded, sick, and shipwrecked at sea, prisoners of war, and civilians. *Id.* at 169-337. The four Geneva conventions have been so widely ratified that their principles are considered to be declaratory of customary international law and therefore binding even on the few states that have not ratified the conventions. *Id.* at 170.

Even after the codifications, the customary law of war remains vital. The Hague and Geneva conventions contain clauses affirming the continued obligation of all nations to observe the customary principles of international law. *Id.* at 4. The charters establishing the international military tribunals that tried the major German and Japanese war criminals after the Second World War derived their principles from customary international law. 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 254 (1947).

10. DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (2d ed. 1981).

11. Other international human rights conventions, such as the International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 2, 95th Cong., 1st Sess. (1978), 999 U.N.T.S. 171, also apply to combat activities.

12. For instance, after World War I the victorious Allies prosecuted hundreds of Germans for war crimes, and the German government, under Allied pressure, also tried suspected German war criminals. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 130, 142 (1982). National military courts carried out most of the war-crimes prosecutions conducted after World War II. DOCUMENTS, *supra* note 9, at 6. National military courts have also tried their own soldiers, under applicable military criminal codes, for offenses that constitute war crimes. *See, e.g.*, JOSEPH GOLDSTEIN ET AL., THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW? 459-74 (1976) (excerpting cases in which the U.S. prosecuted Vietnam War criminals).

national military justice systems often fail. For example, the well-publicized and -documented My Lai atrocity[13] resulted in only one conviction among the thirty U.S. soldiers suspected of involvement in the murders.[14] That soldier, Lieutenant William Calley, was convicted of the premeditated murder of not less than twenty Vietnamese civilians,[15] but he ultimately served only four years in prison.[16] In another case, four U.S. soldiers who were eventually convicted of kidnapping, raping, and murdering a young Vietnamese civilian benefitted at trial from the glowing character testimony of their superiors, despite the substantial weight of evidence against them and the confession of one of the defendants.[17] All were convicted, but after new trials and sympathetic military review boards, their prison terms ultimately ranged from one to four years.[18]

International tribunals, such as the trials of the German and Japanese war criminals after the Second World War, are perhaps the best-known instances of law of war enforcement. However, such tribunals usually result from the distinct circumstances that follow particular conflicts. For instance, the Nuremberg and Tokyo tribunals would not have been possible without the unconditional surrender of the Axis powers at the end of the Second World War. Another international tribunal, the International Court of Justice in the Netherlands, hears civil and criminal cases involving war crimes,[19] but it only considers cases involving states as parties, and it relies on the voluntary submission of member states to its jurisdiction. The United States no longer submits to that jurisdiction.[20]

Efforts to institutionalize a judicial enforcement mechanism for law of war enforcement continue. The United Nations has sponsored the creation of an *ad hoc* international criminal tribunal to prosecute perpetrators of war crimes in the former Yugoslavia.[21] The mission of the tribunal has been extended to the prosecution of atrocities committed during the 1994 Rwandan civil war.[22] Meanwhile, the United Nations is also debating the establishment of a permanent international criminal tribunal, which would have jurisdiction over

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13. The My Lai case and the rape-murder case discussed below were not actually "war crimes" within the scope of the Geneva Conventions, since they were perpetrated by U.S. soldiers against civilians of a friendly nation—the Republic of Vietnam. They are included in this discussion because they are among the best-documented recent examples of major atrocities by U.S. soldiers and because they illustrate limitations of the military justice system applicable to true war crime cases.

14. GOLDSTEIN ET AL., *supra* note 12, at 3.

15. United States v. Calley, 46 C.M.R. 1131, 1172 (C.M.R. 1973).

16. GOLDSTEIN ET AL., *supra* note 12, at x-xi.

17. DANIEL LANG, CASUALTIES OF WAR 93-97 (1969).

18. *Id.* at 100-01, 110-14, 118-19.

19. *See, e.g.*, Bob Bergen, *World Court to Hear Rape-Genocide Argument*, CALGARY HERALD, Mar. 24, 1994, at A18.

20. The U.S. withdrew from the International Court of Justice's compulsory jurisdiction in 1985. Bernard Weinraub, *U.S. Limits its Role at Court in Hague*, N.Y. TIMES, Oct. 8, 1985, at A5.

21. Juliet O'Neill, *The Hague Will Be the New Nuremberg: Alleged Atrocities in ex-Yugoslavia to be Aired Here*, VANCOUVER SUN, Mar. 5, 1994, at A10.

22. *U.N. Appoints Prosecutor for Rwandan Tribunal*, N.Y. TIMES, Jan. 15, 1995, at A6.

war crimes.[23] The proposal is stalled in the Security Council, and there appears to be no international consensus on the desirability of creating a permanent, international court with jurisdiction over human rights offenses.[24] In any event, the absence of an international police authority limits the success of any international criminal tribunal to the willingness of states to turn over suspects to the court.[25]

B. International Tort Claims

It is a basic premise of international law that states, not individuals, are its subjects.[26] Therefore, an individual injured by a foreign state must, under the traditional rules, subordinate his claim to his state of citizenship.[27] Moreover, the principle of sovereign immunity prevents states from being sued in foreign courts without their consent and removes state-to-state tort actions to the realm of diplomacy.[28] The combined effect of these traditional rules has made it very difficult for individuals to pursue tort claims against foreign states.

The customary international norms can be relaxed, however, by the consent of individual states. During World War I, the United States conducted its first extended military operation on the soil of an ally (in that case, France). The large number of U.S. troops naturally generated a substantial number of damages claims by French nationals, which in turn created friction between the U.S and French governments. To defuse the tension, Congress enacted a tort claims act,[29] which became a great success.[30] During World War II, Congress enacted the FCA.[31] The FCA has been quite successful in helping the United States maintain good relations with the populations and governments of allied nations hosting U.S. military forces,[32] but it makes no provision for claims

23. *Id.*; *see also* American Bar Association Task Force on an International Criminal Court, *Final Report*, 28 INT'L LAW. 475 (1994).

24. Raymond Bonner, *U.N. Commission Recommends Rwanda "Genocide" Tribunal*, N.Y. TIMES, Sept. 29, 1994, at A13; Barbara Crossette, *Rwanda Asks Quick Start of Tribunal*, N.Y. TIMES, Oct. 9, 1994, at A19.

25. American Bar Association Task Force, *supra* note 23, at 486-88. Under all three alternative versions of Article 23 of the Draft Statute for the permanent tribunal, states would have the option to completely or partially opt out of the tribunal's jurisdiction. *Id.* at 516-17.

26. RICHARD B. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 5 (1962).

27. *Id.*

28. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 325-26 (4th ed. 1990).

29. Act of April 18, 1918, ch. 57, 40 Stat. 532.

30. More than 38,000 claims were paid under the act in 1918 and 1919. Major William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 MIL. L. REV. 59, 63 n.21 (1966).

31. Act of January 2, 1942, ch. 645, 55 Stat. 880 (codified as amended at 10 U.S.C. § 2734 (1988)).

32. See *infra* part IV.

arising out of combat operations or for tort victims who happen to be citizens of "unfriendly" states.[33]

### C. Applying Tort Principles to War Crimes

Even if the current trends toward increased use of international claims courts and criminal tribunals continue, the suitability of such tribunals for compensating individual victims of war crimes or for achieving justice in individual cases is doubtful. International claims proceedings are an expensive, time-consuming, and unwieldy method of redressing grievances. The limited resources of international criminal tribunals probably will be forever reserved for "major" war criminals, such as military and political leaders.[34] Moreover, the prospect of having U.S. service members tried before international tribunals is certainly not attractive for the citizens or political leaders of the United States. Thus, there is likely to be substantial domestic opposition to giving such tribunals jurisdiction over accused U.S. citizens.

Therefore, U.S. citizens should seek to ensure that the U.S. judicial system provides adequate remedies for war crime victims. If the United States were to create an effective remedy for war crimes victims, the well-established international law rule of exhaustion of local remedies[35] would shield the United States from expensive and politically troublesome international claims litigation. In view of the U.S. military justice system's uneven record of effectiveness in bringing accused U.S. humanitarian law violators to justice, other avenues should be considered.

## III

## JURISDICTION AND JUSTICIABILITY

### A. Choice of Remedy

If the tort in question stems from an act or omission in the United States, plaintiffs might seek remedies under the tort law of the appropriate U.S. jurisdiction. Such torts might result from operational decisions, which, through negligence, recklessness, or intent, lead to war crimes. Such cases would probably be uncommon, however, and as discussed below, the Federal Tort Claims Act would severely restrict their viability.

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33. *See infra* note 102 and accompanying text.

34. The International Criminal Tribunal for the Former Yugoslavia will focus its efforts on major war criminals and "crimes against humanity," rather than individual perpetrators of crimes such as murder and rape. Remarks of Judge Richard J. Goldstone, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, at Duke University, Durham, NC, Nov. 5, 1994.

35. "A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is the alleged author of injury." BROWNLIE, *supra* note 28, at 494-95. The rule does not apply if no effective remedies are deemed available in the defendant state; for instance, if the courts in that state are prevented by a dictatorial ruler from affording relief to a foreign plaintiff. *Id.* at 497-98.

Potential litigants are far more likely to seek remedies under the international law of war. Since international law has the force of federal law in U.S. courts,[36] suing under international law would raise none of the troubling legal issues otherwise inherent in cases arising abroad, such as the unwillingness of federal courts to apply foreign law in suits against the United States and the applicability of U.S. tort law to foreign cases.

However, it is disputed whether private remedies are available for international law violations.[37] The Restatement rule is that international agreements generally do not provide remedies to private parties. However, private remedies might be available, subject to interpretation of the international agreement in question.[38] A customary international law principle that has become part of U.S. law may also provide a remedy in U.S. courts.[39] Whether such a principle may become part of U.S. law may depend on the usage of nations, judicial opinions, and secondary works.[40]

The case law suggests that the Restatement exception may swallow the rule. When international law principles have been properly invoked by tort plaintiffs in U.S. courts, federal judges have rarely denied them a cause of action. It is true that courts have refused to recognize a cause of action for torts caused by lawful belligerent acts.[41] However, since the eighteenth century, U.S. courts have frequently recognized the rights of private litigants to make claims for violations of international law.[42]

B. Jurisdiction

The Alien Tort Statute enacted by the First Congress grants federal courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[43] As one federal court has observed, courts have subjected Alien Tort Statute claims to exacting scrutiny due to the jurisdictional requirement that a "violation of the

36. Ratified treaties have the force of federal law. U.S. CONST. art. VI. Customary international law is also effective as federal law. The Paquete Habana, 175 U.S. 677, 700 (1900).

37. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810 (D.C. Cir 1984) (Bork, J., concurring) (the Geneva Conventions do not provide a private cause of action), *cert. denied*, 470 U.S. 1003 (1985). *But see* Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 628-50 (1989) (arguing that the *Tel-Oren* opinion ignored centuries of contrary U.S. case law).

38. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987) [hereinafter RESTATEMENT (THIRD)]; *see also id.* § 703, cmt. c.

39. *Id.* § 907 & cmt. a.

40. Filartiga v. Pena-Irala, 630 F.2d 876, 884-85 (2d Cir. 1980).

41. *E.g.*, Underhill v. Hernandez, 168 U.S. 250, 253 (1897) ("[A]cts of legitimate warfare cannot be made the basis of individual liability.").

42. *See, e.g., Filartiga*, 630 F.2d at 884-85. For numerous additional examples, *see* Paust, *supra* note 37, at 620 n.501.

43. 28 U.S.C. § 1350 (1988). In 1992 Congress amended the statute to codify the private right of action of torture victims first expressed in *Filartiga*, 630 F.2d at 884-85. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1988)).

law of nations" be demonstrated.[44] Such claims are subject to a preliminary factual review to determine whether an international law violation has occurred, but when such a violation is properly pleaded, jurisdiction will be upheld.[45]

C. Justiciability

Tort actions arising from authorized military operations also raise justiciability questions under the political question doctrine, which prevents the judiciary from interfering with policy judgments that are constitutionally committed to the executive or legislative branches.[46] Federal courts have dismissed some claims arising out of military operations as nonjusticiable by their very nature.[47] Such decisions ignore the judiciary's historical willingness to entertain cases involving military injury to civilians, even in wartime.[48] Recent decisions demonstrate a thoughtful approach, distinguishing between damage actions and actions seeking injunctive relief. In *Koohi v. United States*,[49] the United States Court of Appeals for the Ninth Circuit acknowledged in dictum the history of successful damage claims arising out of military operations and reasoned that actions for damages "will not draw the federal courts into conflict with the executive branch."[50] Other courts have reached the same result by distinguishing between injunctive actions, which raise the threat of direct judicial control over executive decisions, and damage actions, which compensate civilian victims with minimal interference in executive policy decisions.[51] Therefore, there is no basis for the idea that all tort claims arising from military operations are nonjusticiable.

## IV

## U.S. GOVERNMENT IMMUNITY

It has long been settled under U.S. law that the doctrine of sovereign immunity, which immunizes a government from suit unless it consents, applies to the U.S. government.[52] There are two federal waiver-of-immunity statutes under which foreign victims of war crimes might attempt to sue the U.S. government in U.S. courts: the Federal Tort Claims Act (the "FTCA")[53] and the FCA.[54] Further examination reveals that both the FTCA and the FCA

44. *Filartiga*, 630 F.2d at 887-88.
45. *Id.*
46. Baker v. Carr, 369 U.S. 186, 217 (1962).
47. Eminente v. Johnson, 361 F.2d 73 (D.C. Cir.), *cert. denied*, 385 U.S. 929 (1966).
48. *See, e.g.*, The Paquete Habana, 175 U.S. 677 (1900).
49. 976 F.2d 1328 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2928 (1993).
50. *Id.* at 1332.
51. *See, e.g.*, Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).
52. United States v. McLemore, 45 U.S. 286, 288 (1846).
53. Ch. 753, 60 Stat. 843 (1946) (codified as amended in scattered sections of 28 U.S.C.).
54. 10 U.S.C. § 2734 (1988).

contain exceptions that preclude virtually all actions by foreign war crimes victims injured abroad.

### A. The Federal Tort Claims Act

For most potential war crime victim-plaintiffs, the preferred defendant will be the U.S. government, since the chances of recovering on a judgment against the government are much better than against an individual defendant. The FTCA is the principal U.S. statute under which the U.S. government consents to suit. Under the FTCA, the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances," but not generally for punitive damages.[55] It contains four exceptions, however, that could affect the viability of claims by war crimes victims: the assault and battery exception;[56] the combatant activities exception;[57] the foreign country exception;[58] and the discretionary function exception.[59] Together, these exceptions make it extremely difficult for a war crime victim to state a case in U.S. courts.[60]

1. *The "Assault and Battery" Exception.* Section 2680(h) of the FTCA immunizes the government from "[a]ny claim arising out of assault, battery," or certain other intentional torts. Since many war crimes, such as intentional shootings or rapes, might be characterized as batteries, the government could claim immunity under this section. Indeed, the plain language of the exception bars claims arising solely from an assault or battery.[61] Therefore, the government will not be liable for a battery committed by an employee merely on a *respondeat superior* theory. However, there is considerable doubt whether the exception bars *all* claims involving assaults or batteries by government employees. In *Sheridan v. United States*, the U.S. Supreme Court held that a tort action arising out of a battery by a government employee is not barred when there is a basis for negligence liability independent of the batterer's government employment status.[62] However, the *Sheridan* majority did not decide whether torts arising both from battery and from factors dependent on that batterer's government employment status, such as negligent selection or

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55. 28 U.S.C. § 2674 (1988). In wrongful death cases arising in jurisdictions where punitive damages are the only remedy, the United States is liable for actual or compensatory damages in lieu of punitives. *Id.*

56. *Id.* § 2680(h).

57. *Id.* § 2680(j).

58. *Id.* § 2680(k).

59. *Id.* § 2680(a).

60. I am indebted in my analysis to Kenneth Kingshill, *supra* note 4, who first analyzed the applicability of some of these FTCA exceptions in the context of possible actions by Laotian bombing victims.

61. Sheridan v. United States, 487 U.S. 392, 398 (1988).

62. For instance, independent liability exists when Navy corpsmen discover that a drunken serviceman is carrying an unauthorized firearm, and they allow that serviceman to keep his firearm, which he then uses to shoot a passing civilian. *Id.* at 402-03.

supervision of the battering employee, fall within the exception.[63] The *Sheridan* dissent argued that allowing a tort claim against the government for negligent selection or supervision would destroy the very core of the assault and battery exception.[64]

The failure of the Supreme Court to address the employment-related negligence issue leaves intact the conflicting decisions of the U.S. courts of appeals, most of which hold that the exception bars all negligence claims against the government in cases involving battery.[65] Therefore, until the Supreme Court or Congress clarifies the meaning of the exception, any tort suits for damages resulting from batteries by government employees will be barred in most federal courts.

2. *The "Combatant Activities During Time of War" Exception.* The exception most obviously affecting war crimes tort claims is that of section 2680(j), which immunizes the government from "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[66] The subsection raises two interpretive questions: what constitutes "time of war," and what are "combatant activities"? Unfortunately, the legislative history of the FTCA is not helpful in interpreting this subsection.[67]

*a. "Time of War."* Federal courts have rejected the contention that "time of war" for purposes of this and other statutes refers only to declared war. In one FTCA claim, a district court held simply that the Vietnam War, even though undeclared, constituted a war for purposes of the combatant activities exception.[68] One commentator[69] has suggested that other courts might follow the more exacting analysis of *Orlando v. Laird*[70] and evaluate the constitutionality of the underlying conflict in order to determine whether a "state of war" exists.

However, in a recent case arising out of the Persian Gulf "Tanker War" of the 1980s, *Koohi v. Unites States*, the United States Court of Appeals for the

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63. *Id.* at 403 n.8.

64. *Id.* at 411.

65. Kathleen de Jonge, Note, *Recovery Under the Federal Tort Claims Act for Government Negligence Which Leads to an Intentional Tort by a Government Employee*, 30 ARIZ. L. REV. 497, 499 (1988).

66. 28 U.S.C. § 2680(j) (1988).

67. H.R. Rep. No. 1287, 79th Cong., 1st Sess. 4 (1945), merely states that the exception "exempts from the bill claims arising out of the activities of the military or naval forces or the Coast Guard during time of war." *See also* Koohi v. United States, 976 F.2d 1328, 1333 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993).

68. Morrison v. United States, 316 F. Supp. 78, 79 (M.D. Ga. 1970).

69. Kingshill, *supra* note 4, at 167-68.

70. 443 F.2d 1039 (2d Cir.) (holding that, for purposes of a challenge to executive authority to order soldiers into combat, the U.S. military action in Vietnam was sufficiently ratified by Congress and was therefore constitutionally proper), *cert. denied*, 404 U.S. 869 (1971).

Ninth Circuit failed to apply the *Orlando* standard to the FTCA.[71] The case arose out of the destruction of an Iranian civilian airliner by the U.S. warship Vincennes during the Iran-Iraq war. The court concluded that the U.S. effort to protect Persian Gulf shipping during that war constituted a "time of war" for purposes of the combatant activities exception, regardless of the existence or degree of congressional authorization for the military action.[72] In the court's view, "time of war" for FTCA purposes was purely a matter of military reality, subject only to executive authorization, and had nothing to do with *Orlando*'s constitutional analysis:

> In sum, we have no difficulty in concluding that when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation, the FTCA [combatant activities] exception applies. Under those circumstances, a "time of war" exists, at least for purposes of domestic tort law.[73]

To justify this expansive interpretation of the exception, the court reasoned that applying the exception to negligent conduct during any military action authorized by the executive would allow uses of tort law that Congress could not have contemplated in enacting the statute. Specifically, the court expressed a fear that waiving government immunity in a case like the *Vincennes* incident (in which the crew of the U.S. warship genuinely believed that it was endangered by an unidentified aircraft) would deter U.S. forces from vigorously carrying out vital combat missions.[74] Moreover, waiving immunity would provide compensation only for a small segment of the many victims of war, and it would apply tort law's stigma of blame to U.S. service members merely because they had defended themselves.[75] The court concluded:

> For these and other reasons, tort law, in toto, is an inappropriate subject for injection into the area of military engagements. The FTCA clearly recognizes this principle, and we see no reason why Congress would want to differentiate in this respect between declared and undeclared wars.[76]

In view of this opinion and the absence of any contrary federal case law, it seems that the "time of war" definition will rule out the vast majority of potential FTCA claims for damages arising from law of war violations. However, other cases interpreting the "combatant activities" prong of the exception seem to leave room for certain types of claims, specifically, claims arising from tortious conduct outside the zone of combat.

*b. "Combatant Activities."* In an early case interpreting the meaning of "combatant activities," a federal district court held that the exception did not

71. 976 F.2d 1328 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993).
72. *Id.* at 1333-34.
73. *Id.* at 1335.
74. *Id.* at 1334-35.
75. *Id.*
76. *Id.* at 1335.

apply to a training accident that resulted in the deaths of civilians.[77] The court, after consulting two dictionaries for a definition of "combatant,"[78] opined:

> [T]he phrase was used to denote actual conflict, such as where the planes and other instrumentalities were being used, not in practice and training, far removed from the zone of combat, but in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc .... [I]n actual fighting, the attention and energies of the military personnel would be directed and devoted to the destruction of the enemy and its property, as well as to the protection of the lives of their own forces, citizens and property by the use of force immediately applied.[79]

This interpretation would seem to exclude any violent, wartime military action from the scope of the FTCA as a "combatant activity" so long as the action was against enemy forces or was carried out in enemy territory. Such an interpretation would be consistent with the treatment of the "time of war" prong of the exception.

The first appellate case to interpret the "combatant activities" exception, *Johnson v. United States*,[80] took an even wider view. The court, starting from the same "physical violence" definition of combat used in the district court case, concluded that while the exception did not apply to activities of supply ships far from the combat zone occurring after cessation of hostilities, a supply operation in support of a combatant would "undoubtedly [be a] 'combat activity.'"[81]

More recent case law has elaborated on the earlier interpretations of the "combatant activities" prong of the exception. In an attempt by chemical company defendants to implead the government into an Agent Orange suit brought by Vietnam veterans and their families, a federal district court held that the "combatant activities" exception does not bar plaintiffs from suing the government for injuries resulting from the government's deliberate omission of warning labels on chemical containers.[82] The court reasoned that the decision to omit the warning labels did not arise from "combatant activities."[83] The court held that for the exception to apply, an act or omission of a government employee must arise from combatant activity, not a mere supporting function far removed from the combat theater.[84]

The significance of the *Agent Orange* holding is that it firmly placed tortious behavior by U.S. personnel *in the United States*—even activity in support of combat operations—outside the combatant activities exception.

Another district court, in a suit by a deceased soldier's mother over the Army's failure to properly account for him and care for his remains, held that "accounting for and identifying soldiers under the exigencies of a combat zone is a military operation comparable to combat itself" and that therefore such

77. Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947).
78. *Id.* at 374.
79. *Id.*
80. 170 F.2d 767 (9th Cir. 1948).
81. *Id.* at 770.
82. *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984).
83. *Id.*
84. *Id.*

activities fall within the "combatant activities" exception.[85] This case suggests that U.S. courts will interpret the "combatant activities" component of the exception broadly as long as the activity is deemed to have occurred in a combat zone.

The *Koohi* court followed the same line of reasoning, holding that the tracking of suspected enemy aircraft and the firing of weapons were combatant activities, even though no hostile force was actually present:

> The conduct of the Vincennes that forms the subject of the plaintiffs' lawsuit is that involving the tracking, identification, and destruction of unidentified aircraft that appear to pose a threat to the warship's safety. The firing of a missile in perceived self-defense is a quintessential combatant activity.[86]

The combatant activities exception thus immunizes the government from suits arising from a wide range of activities surrounding combat operations. Therefore, it has much the same effect as the foreign country exception,[87] which will now be discussed only briefly.

3. *The "Foreign Country" Exception.* The foreign country exception has been interpreted to preclude claims arising out of tortious acts in any nation not subject to U.S. sovereignty, even in foreign areas under U.S. military occupation.[88] However, more recent case law has held that the place of injury is not necessarily controlling: Tortious acts or omissions within the United States do not enjoy protection under the foreign country exception, even though the injury occurs abroad.[89] The place of the negligent act or omission, not the place of the injury, provides the controlling law, and therefore the foreign country exception does not apply to such cases.[90]

4. *The "Discretionary Function" Exception.* The exceptions discussed above would allow the foreign plaintiff to recover against the United States for tortious acts committed in the United States, such as orders to carry out unlawful military operations. The discretionary function exception,[91] however, narrows the scope of possible claims even further. It exempts from the scope of the FTCA

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure

85. Vogelaar v. United States, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987).

86. Koohi v. United States, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992) (citing Johnson v. United States, 170 F.2d 767 (9th Cir. 1948)), *cert. denied*, 113 S. Ct. 2928 (1993).

87. 28 U.S.C. § 2680(k) (1988).

88. Occupied Okinawa was deemed to be a foreign country for FTCA purposes, since it would have violated international conventions to apply U.S. tort law to an occupied part of a foreign country. Cobb v. United States, 191 F.2d 604 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952). Occupied Saipan was also considered a foreign country. Brunnell v. United States, 77 F. Supp. 68 (S.D.N.Y. 1948).

89. Leaf v. United States, 588 F.2d 733 (9th Cir. 1978); *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975).

90. *Paris Air Crash*, 399 F. Supp. at 737-38.

91. 28 U.S.C. § 2680(a) (1988).

> to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[92]

The discretionary function doctrine has been held to apply to any policy decision taken by government officials.[93] Only a breach of duty in respect to the *implementation* of such policy decisions would be actionable.[94] However, it is difficult to imagine a case in which negligent implementation of a policy decision *in the United States* could be a proximate cause of a war crime abroad. One example might be a failure of the U.S. military services to properly train mobilizing units in the provisions of the Geneva and Hague Conventions.[95] In the absence of such negligence within the United States, however, the discretionary function exception, combined with the foreign country and combatant activities exceptions, effectively bars tort actions against the United States for war crimes occurring abroad.

B. The Foreign Claims Act

The FCA[96] fills part of the gap left by the foreign country exception to the FTCA by providing an administrative remedy for claims arising in foreign countries in peacetime. The FCA empowers the Secretary of Defense to settle for up to $100,000 any claim arising out of noncombat U.S. military activities in a foreign country.[97] Under the FCA, the military services have implemented regulations providing for the appointment of Foreign Claims Commissions, consisting of three officers, which have the authority to investigate claims immediately and to make settlements of up to $25,000 on their own authority.[98] The commissions may make investigative findings based on a preponderance of the evidence, and they need not identify the individual tortfeasor in order to make a settlement.[99]

The FCA is widely credited with improving the image of U.S. forces abroad and increasing the ability of U.S. forces to maintain criminal jurisdiction over

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92. *Id.*

93. *See, e.g.*, Ward v. United States, 471 F.2d 667 (3d Cir. 1973).

94. *Id.*

95. The Hague Convention IV and each of the four 1949 Geneva Conventions contain provisions obliging signatories to incorporate the provisions of the treaties into their respective military training programs. *E.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Aug. 12, 1949, art. 47, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62. The inquiry into the U.S. war crime at My Lai in 1968 identified a deficiency in the implementation of U.S. law of war training policy during the mobilization of the responsible unit that "played a significant part" in the occurrence of the tragedy. GOLDSTEIN ET AL., *supra* note 12, at 204-05. Since the Vietnam War, however, the U.S. armed forces have implemented law of war training requirements to bring them into compliance with the Geneva Conventions. Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 181-85 (1993). Therefore, such a cause of action is not likely to arise.

96. 10 U.S.C. § 2734 (1988); *see supra* text accompanying notes 31-33.

97. 10 U.S.C. § 2734 (1988).

98. Lieutenant Colonel Ronald Warner, *Planning for Foreign Claims Operations During Overseas Deployment of Military Forces*, ARMY LAW., July 1987, at 61, 62-63.

99. *Id.*

U.S. service members stationed abroad.[100] When crime victims are compensated rapidly through administrative proceedings, host-nation prosecutors and judges are more willing to waive jurisdiction or to impose lighter sentences on U.S. service members.[101]

The FCA provides no remedy to victims of war crimes, however, because it specifically excludes claims by nationals of countries unfriendly to the United States[102] and claims arising out of combat.[103] The "arising out of combat" exception contains its own exception for claims arising "from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States."[104] However, an "accident or malfunction" would almost certainly not be defined as a war crime. Therefore, the FCA provides no basis for relief for victims of war crimes.

### C. Actions Against Individual Service Members

Since sovereign immunity would prevent almost all war crime victims from proceeding against the U.S. government in U.S. courts, victims might instead proceed against individual U.S. war criminals, if those individuals could be identified and were solvent. The common law rule once held that governmental employees were always personally liable for their own torts.[105] Today, cases against federal employees must survive possible substitution of the United States as a defendant under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "FELRTCA").[106] The FELRTCA provides for substitution of the United States as the defendant if the government certifies that the employee was acting in the "scope of office or employment," or if the court agrees to make the certification as a finding.[107] In that event, sovereign immunity would trigger the dismissal of the case, unless the case could survive the exceptions to the FTCA described above. Substitution under the FELRTCA would immunize the government employee even though that substitution, combined with federal immunity, would result in denying the plaintiff a remedy.[108]

Therefore, the key prerequisite to a successful suit against a war criminal is a determination that the criminal was not acting within his "scope of employment" for purposes of the Act. Since one of the purposes of the FELRTCA was to bring uniformity to the field of federal employee liability, the applicable

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100. *E.g.*, Lieutenant Colonel David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act*, 37 A.F. L. REV. 191, 208 (1994).
101. *Id.*
102. 10 U.S.C. § 2734(b)(2) (1988).
103. *Id.* § 2734(b)(3).
104. *Id.*
105. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 132, at 1056 (5th ed. 1984).
106. 28 U.S.C. § 2679 (1988).
107. *Id.* § 2679(d).
108. United States v. Smith, 499 U.S. 160 (1991).

law for such a determination is the common law of agency.[109] Thus, in resolving the "scope of employment" question, a court would need to determine whether a service member's intentionally criminal conduct is imputable to the government.

Under the traditional rule, masters were not responsible for the intentional wrongdoing of servants.[110] The modern tendency has been to impute some types of intentional employee wrongdoing to the employer in order to further the risk-spreading rationale of the *respondeat superior* doctrine.[111] The general test is whether the purpose of the conduct is, at least in part, to further the interests of the master.[112] Thus, where the tort arises directly out of the servant's performance of his duties, the employer will be held liable.[113] However, when the employee's motives are purely personal, the employer will not be considered liable.[114] Some courts have also held that "outrageous" employee misconduct can be proof that the employee's motive was purely personal, but that rule has not been uniformly applied.[115] Since soldiers in a combat zone are generally considered to be on duty at all times, it is difficult to imagine a judicial finding that a soldier in a combat zone acted from "purely personal" motives.

An additional trend in modern agency law has been to hold employers liable for any foreseeable employee misconduct on the theory that in most occupational situations, the employer is the best loss avoider.[116] This reasoning certainly applies to torts arising out of military operations. Another possible basis for attributing service member misconduct to the government is the common law "dangerous instrumentalities" doctrine, which holds that a master assumes liability by the mere act of entrusting the servant with a dangerous instrument that poses a great risk of harm to others.[117] Although the doctrine is old and not universally accepted,[118] it would certainly seem to be appropriate to military operations.

Because of the substantial deference usually accorded to military operations, the peculiar nature of the military profession, and the variety of doctrines available to justify attributing a service member's actions to the government, a court is unlikely to find any action by a service member engaged in a combat operation to be outside the "scope of employment." Therefore, substitution of the Federal Government as defendant under the FELRTCA in a case involving war crimes is almost certain.

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109. Garcia v. United States, 799 F. Supp. 674, 681 (W.D. Tex. 1992).
110. KEETON ET AL., *supra* note 105, § 70, at 505.
111. *Id.*
112. *Id.*
113. *Id.* at 506.
114. *Id.*
115. *Id.*
116. *Id.* at 504-05.
117. *Id.* at 507.
118. *Id.*

### D. The Result: No Remedy for War Crimes Victims

The result achieved by the application of the FTCA and the FCA is certainly ironic: a foreign-born plaintiff suing a former agent of a foreign government for an international law violation that had no connection to the United States has a good chance of success in U.S. courts,[119] but a foreign victim of a war crime committed by U.S. personnel, or even a victim of a war crime directed by U.S. leaders, has virtually no chance of succeeding in those same courts. Moreover, a civilian victim of an accidental bombing may claim relief under the FCA, but the victim has no basis for FCA relief if the bombing was an intentional war crime.[120]

Although no explicit legislative history exists on the subject, the maze of FTCA exceptions relating to combat activities abroad makes it likely that Congress intended to avoid the prospect of enemy nations and their citizens gaining access to the U.S. civil justice system. Given the massive destruction and death that can result from even the best-conducted military operations, the fear of abuse of the court system by foreigners certainly seems valid.[121]

## V

## A PROPOSAL FOR REFORM

Opening up the U.S. tort system to foreigners for torts stemming from military operations poses enormous problems. It is likely that authoritarian or communist governments of some U.S. military adversaries would seek to strike back at the United States by encouraging their citizens to sue and by sponsoring the litigation in U.S. courts. Successful litigants might even have their awards confiscated by their governments. In this way, the fundamental purpose of the tort system would be frustrated, and the tort action for war crimes victims would be discredited, since it would be considered only a political tool for the governments of vindictive U.S. adversaries. Even if the system were not abused, the commitment in time and money required for successful U.S. court action might exclude all but the wealthiest and most patient plaintiffs.

Amending the FELRTCA to allow actions against U.S. individuals would also do more harm than good. The benefits of such an amendment would be scant: It would rarely be useful to war crimes victims, since most potential defendants would not be sufficiently wealthy to satisfy a substantial judgment.

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119. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

120. *See supra* note 104 and accompanying text.

121. Even in this country, some commentators consider almost any U.S. involvement in combat to be a war crime, regardless of whether the U.S. military committed any act proscribed by international law. *See generally* RAMSEY CLARK, THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF (1992); *compare* Major Ariane L. De Saussure, *The Rôle of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. REV. 41, 58-68 (1994). Therefore, it is not difficult to imagine hostile foreign governments using poorly supported war crimes allegations as a pretext to abuse the U.S. court system.

On the other hand, the dangers of creating civil war crimes liability for individual U.S. service members would be great. Exposing service members to personal tort liability to foreigners might undermine military discipline by encouraging individual soldiers to disobey orders on the pretext of avoiding potential lawsuits. The prospect of tort liability also might prevent soldiers from fighting aggressively enough to win on the battlefield. Moreover, amending the FELRTCA could expose leaders at all levels of command to agency liability for the actions of war criminals, whether or not those leaders were in a position to prevent the crimes.

However, as stated at the outset of this note,[122] there are good reasons to provide foreign victims of U.S. war crimes with some sort of remedy. The successful experience of the FCA demonstrates the benefits of providing foreign nationals with a quick, efficient administrative remedy for torts committed by U.S. forces.[123] Therefore, an obvious solution is to enact a variation of the FCA[124] or to amend the FCA itself to enable victims of U.S. war crimes to seek compensation regardless of their nationality or whether the injury resulted from combat operations.

Various benefits would accrue from the creation of a permanent system for war crimes compensation by the U.S. government. Granted, expanding the FCA to include war crimes victims in "unfriendly" states would mean additional budget expenditures, but assuming that the claim limits are similar to those of the current FCA, the expenditure would not be an enormous burden.[125] The existence of claims by war crimes victims would provide a constant reminder to lawmakers and military officials that aggressive measures are necessary to prevent war crimes. Such preventive measures might include placing more emphasis on law of war training for military personnel, including legal staff officers in the planning of combat operations in brigade or battalion-sized units,[126] and incorporating prisoners of war and civilians into training exercises on a more frequent basis.[127] More importantly, the presence of such a remedy

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122. *See supra* parts I and II.

123. *Supra* note 100 and accompanying text.

124. *See infra* part IV.

125. *See supra* note 97 and accompanying text.

126. Current U.S. Army organization, for example, provides for only one Judge Advocate General's Corps operational lawyer at the divisional level. Addicott & Hudson, *supra* note 95, at 183. This lawyer provides the only operational law supervision for the division, which contains at least 20 subordinate combat unit staffs. Some war crimes arise from faulty operations plans at lower levels of command. *Id.* at 168-69. Assigning operational law specialists to lower levels of command might prevent such violations. The Air Force assigns operational lawyers at the air wing level, and the benefits in terms of operational law awareness and compliance have been substantial. Interview with Scott L. Silliman, Executive Director, Duke University Center of Law, Ethics, and National Security, in Durham, N.C. (Sept. 1994).

127. U.S. Army light infantry units participate in regular law-of-war training, which is integrated into their field exercises. Marc L. Warren, Enforcing the Third Geneva Convention: the United States Army Approach 3-5 (March 10, 1995) (unpublished manuscript, on file with author). However, it is the author's personal experience that law of war instruction is rarely integrated into the training of U.S. Army mechanized units.

would provide compensation for those injured by U.S. violations of the law of war.

Of course, an administrative system would not be the answer for all potential war crimes victims. Many victims, especially victims of illegal aerial bombardment, might be far from the nearest U.S. claims commission and thus unable to present a claim. During periods of intense combat, it might be nearly impossible for U.S. investigators to substantiate even the most meritorious claims. The victim's government, engaged in combat against U.S. forces, might be unwilling to cooperate. Despite these shortcomings, an administrative system modeled on the FCA is probably the best solution available. Through such a system, the U.S. could compensate those most likely to suffer from war crimes committed by U.S. troops: inhabitants of U.S.-occupied enemy territory and individuals under U.S. custody, such as prisoners and internees.

Other writers have suggested that a domestic war crimes prosecution apparatus, separate from the Department of Defense, would be the best way to ensure U.S. compliance with the laws of war.[128] While an independent criminal prosecution system might help enforce compliance with the law of war, a criminal system would not provide compensation to victims, nor would it provide comfort to those victims whose cases are not pursued by the prosecution authority, which might be influenced by domestic political pressures and resource limitations. Therefore, many victims would have no practical method to seek justice and compensation. A provision for an effective civil claims mechanism for foreign war crimes victims, in addition to the diligent criminal prosecution of offenders, would provide for more comprehensive administration of justice.

## VI

## CONCLUSION

Many people question the need for a compensation system intended to benefit citizens of hostile nations. After all, war is deadly and destructive business, and many fall victim to its ravages. Why should we single out victims of war crimes for special status?[129] The answer to this question is straightforward. We should compensate war crime victims because the United States prides itself on its adherence to the rule of law. If the United States truly desires to conduct its military operations in a spirit of justice and benevolence, there is little room for law of war violations, and we should not tolerate the existence of legions of aggrieved war crimes victims unable to gain justice

128. In the aftermath of the My Lai controversy, it was proposed that the U.S. District Court for the District of Columbia be vested with jurisdiction over U.S. servicemen accused of war crimes, and that the Department of Justice assume prosecution responsibilities. GOLDSTEIN ET AL., *supra* note 12, at 11-15.

129. This question was raised most recently in the opinion in Koohi v. United States, 976 F.2d 1328, 1334-35 (9th Cir. 1992), *cert. denied,* 113 S.Ct. 2928 (1993). *See supra* notes 71-76 and accompanying text.

against the very nation which professes to dispense that commodity in the international sphere.

If the U.S. military continues to carry out combat operations with the discipline and consideration for international law that characterized the Persian Gulf operation,[130] tort liability for war crimes should not be a major concern. The presence of the remedy, however, would demonstrate to the world and to U.S. citizens that the United States is serious about adhering to the rule of law in its conduct of military operations.

130. U.S. military leaders, acutely conscious of the U.S. military's previous failures in the area of humanitarian law compliance in Southeast Asia, made great efforts during the Gulf War to minimize law of war violations. *E.g., Army Teaches Gulf Soldiers How to Avoid My Lai-Type Massacre*, Pittsburgh Press, Feb. 24, 1991, at A9. As a result, the Allied Coalition's campaign to liberate Kuwait was probably one of the best examples in military history of compliance with the law of war. For instance, officials of the International Committee of the Red Cross, which monitored U.S. prisoner of war camps, told U.S. military police officials that their treatment of Iraqi prisoners was the best compliance with the Geneva Prisoner of War Convention in history. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 620 (1992); *see also* De Saussere, *supra* note 121, at 58-68. For a conflicting view of the Coalition's law of war compliance, albeit one influenced by Iraqi propaganda, see CLARK, *supra* note 121.